IN THE INCOME TAX APPELLATE TRIBUNAL
*KOLKATA BENCH "**A**" KOLKATA*

Before **Shri A.T.Varkey, Judicial Member** and
Shri Waseem Ahmed, Accountant Member

ITA No.215-218/Kol/2016 Assessment Years :2001-02 to 2004-05

Debottor Trust Estate of Rammohan Mullick Kolkata, 39, Jatindra Mohan Avenue, Kolkata-700 005 [**PAN No.AAATD 5679 A**]	**V/s.**	Income Tax Officer, Ward-43(4), 3, Government Place, Ground Floor, Kolkata-700 001
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

आवेदक की ओर से/By Assessee	Shri B. Chakraborty, AR
राजस्व की ओर से/By Revenue	Shri Pinaki Mukherjee, JCIT-SR-DR
सुनवाई की तारीख/Date of Hearing	08-12-2016
घोषणा की तारीख/Date of Pronouncement	11-01-2017

आदेश /O R D E R

PER Waseem Ahmed, Accountant Member:-

These four appeals by same assessee are against the different orders of Commissioner of Income Tax (Appeals)-13, Kolkata by even dated i.e. 30.11.2015. Assessments were framed by ITO Ward-43(4), Kolkata u/s 143(3)/147) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') vide their orders dated 30.12.2008, 31.12.2009 for assessment years 2001-02 to 2004-05 respectively.

Shri B. Chakraborty, Ld. Authorized Representative appeared on behalf of assessee and Shri Pinaki Makherjee, Ld. Departmental Representative appeared on behalf of Revenue.

2. All the appeals are heard together and are being disposed of by way of a consolidated order for the sake of convenience.

First we take up **ITA No.215/Kol/2016** for AY 2001-02.

3. The first issue raised by the assessee in this appeal is that ld. CIT(A) erred in confirming the order of AO by holding the assessment under section 147 of the Act as valid.

4. At the outset the ld. AR appearing for assessee has challenged the assessment proceedings u/s 147 of the Act on the ground that the conditions for initiating proceedings under the Act have not been complied with. The ld. AR before us submitted that proceedings under section were initiated on account of two reasons as discussed below :

1. The AO observed that the assessee has claimed exemption under section 11 of the Act without having valid registration under section 12A of the Act.
2. The AO also observed that the assessee has claimed personal expenses against the income of other sources which are not allowable under section 57 of the Act.

However it was submitted that the trust is not registered under section 12A of the Act and consequently there is no question for claiming the exemption under section 11 of the Act. Therefore the observation of the AO for reopening the case u/s 147 of the Act that the assessee has claimed exemption u/s 11 of the Act is based on his surmise, conjecture. Accordingly, the assessment is liable to be quashed. Similarly, the AO initiated the proceedings u/s 147 of the Act on the ground that the assessee has claimed personal expenses against the income of other sources which are not allowable u/s57 of the Act.

However the fact is that no expenditure of whatsoever was claimed by the assessee in its income tax return. The assessee has just shown the TDS deducted in the name of the assessee in its return which is placed on page 60 of the paper book with sole purpose of claiming the refund of the TDS. Even the income corresponding to TDS was not shown in the income tax return filed by the assessee. In this regard the ld. AR further submitted that the income corresponding to TDS was duly shown in the hands of 9 deities/Idols return which are placed on pages 51 to 69 of the paper book.

On the other hand the ld. DR vehemently supported the order of authorities below.

5. We have heard the rival contentions and perused the materials available on record. It is well settled in law that reasons, as recorded for reopening the reassessment, are to be examined on a standalone basis. Nothing can neither be added to the reasons so recorded nor anything can be deleted from the reasons so recorded. The Hon'ble Bombay High Court, in the case of Hindustan Lever Ltd. vs. R.B. Wadkar [(2004) 268 ITR 332], has, inter alia, observed that :

> *".....It is needless to mention that the reasons are required to be read as they were recorded by the AO. No substitution or deletion is permissible. No additions can be made to those reasons. No inference can be allowed to be drawn on the basis of reasons not recorded. It is for the AO to disclose and open his mind through the reasons recorded by him. He has to speak through the reasons." Their Lordships added that "The reasons recorded should be self-explanatory and should not keep the assessee guessing for reasons. Reasons provide link between conclusion and the evidence....".*

Therefore, the reasons are to be examined only on the basis of the reasons as recorded.

6 The next important point is that even though reasons, as recorded, may not necessarily prove escapement of income at the stage of recording the reasons, such reasons must point out to an income escaping assessment and not merely need of an inquiry which may result in detection of an income

escaping assessment. Undoubtedly, at the stage of recording the reasons for reopening the assessment all that is necessary is the formation of prima facie belief that an income has escaped the assessment and it is not necessary that the fact of income having escaped assessment is proved to the hilt. What is, however, necessary is that there must be something which indicates, even if not establishes, the escapement of income from assessment. It is only on this basis that the Assessing Officer can form the belief that an income has escaped assessment. Merely because some further investigations have not been carried out, which, if made, could have led to detection to an income escaping assessment, cannot be reason enough to hold the view that income has escaped assessment. It is also important to bear in mind the subtle but important distinction between factors which indicate an income escaping the assessments and the factors which indicate a legitimate suspicion about income escaping the assessment. The former category consists of the facts which, if established to be correct, will have a cause and effect relationship with the income escaping the assessment. The latter category consists of the facts, which, if established to be correct, could legitimately lead to further inquiries which may lead to detection of an income which has escaped assessment. There has to be some kind of a cause and effect relationship between reasons recorded and the income escaping assessment.

6.1 While dealing with this aspect of the matter, it is useful to bear in mind the observations made by Hon'ble Supreme Court in the case of ITO Vs Lakhmani Mewal Das [(1976) 103 ITR 437] that,

> *".....the reasons for the formation of the belief must have rational connection with or relevant bearing on the formation of the belief. Rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the ITO and the formation of this belief that there has been escapement of the income of the assessee from assessment in the particular year because of his failure to disclose fully and truly all material facts. It is no doubt true that the Court cannot go into sufficiency or adequacy of the material and substitute its own opinion for that of the ITO on the point as to whether action should be initiated for reopening assessment. At the same time we have to bear in mind that it is not any and every material, howsoever vague and indefinite or distant, remote and farfetched, which*

would warrant the formation of the belief relating to escapement of the income of the assessee from assessment."

6.2 Similarly *in CIT vs. Kelvinator of India Ltd* reported in 320 ITR 561, the Full Bench of Hon'ble Supreme Court held as under :-

"It is a well settled principle of interpretation of statute that the entire statute should be read as a whole and the same has to be considered thereafter chapter by chapter and then section by section and ultimately word by word. It is not in dispute that the Assessing Officer does not have any jurisdiction to review his own order. His jurisdiction is confined only to rectification of mistakes as contained in section 154 of the Act. The power of rectification of mistake conferred upon the Income-tax Officer is circumscribed by the provisions of section 154 of the Act. The said power can be exercised when the mistake is apparent. Even a mistake cannot be rectified where it may be a mere possible view or where the issues are debatable. Even the Income-tax Appellate Tribunal has limited jurisdiction under section 254(2) of the Act. Thus when the Assessing Officer or Tribunal has considered the matter in detail and the view taken is a possible view the order cannot be changed by way of exercising the jurisdiction of rectification of mistake. It is a well settled principle of law that what cannot be done directly cannot be done indirectly. If the Income-tax Officer does not possess the power of review, he cannot be permitted to achieve the said object by taking recourse to initiating a proceeding of reassessment or by way of rectification of mistake. In a case of this nature the Revenue is not without remedy. Section 263 of the Act empowers the Commissioner to review an order which is prejudicial to the Revenue."

In Bawa Abhai Singh"s case [2002] 253 ITR 83 (Delhi), a Division Bench of Hon'ble Delhi High court clearly held that :

*"The crucial expression is "**reason to believe**". The expression predicates that the Assessing Officer must hold a belief . . . by the existence of reasons for holding such a belief. In other words, it contemplates existence of reasons on which the belief is founded and not merely a belief in the existence of reasons inducing the belief. Such a belief may not be based merely on reasons but it must be founded on information. As was observed in Ganga Saran and Sons P. Ltd. v. ITO [1981] 130 ITR 1 (SC), the expression "reason to believe" is stronger than the expression "is satisfied". The belief entertained by the Assessing Officer should not be irrational and arbitrary. To put it differently, it must be reasonable and must be based on reasons which are material. In S.Narayanappa v. CIT [1967] 63 ITR 219, it was noted by the apex court that the expression "reason to believe" in section 147 does not mean purely a subjective satisfaction on the part of the Assessing Officer, the belief must be held in good faith ; it cannot be merely a pretence. It is open to the court to examine whether the reasons for the belief have a rational nexus or a relevant bearing to the formation of the belief and are not extraneous or irrelevant for the purpose of the section. To that limited extent, the action of*

> *the Assessing Officer in initiating proceedings under section 147can be challenged in a court of law."*

6.3 We are therefore of the opinion that section 147 of the Act does not postulate conferment of power upon the Assessing Officer to initiate reassessment proceeding upon his mere change of opinion. It is necessary to examine whether there was any "reason to believe" to have had such an exercise. The term "reason to believe" cannot be considered or evaluated in a water tight compartment and scope and applicability may vary from case to case, depending upon the facts and circumstances. The power under sections 147 / 148 comes into existence if he had reason to believe that income has escaped assessment. Formation of reason to believe that income escaped assessment has to be that of a prudent person. The reasons for such belief have to be recorded in writing on the basis of material in the possession of AO. While the words "reason to believe" are wide in their import, it cannot include a mere suspicion or ipse dixit of the AO. The belief of the AO should lead him to form an honest and reasonable opinion based on reasonable grounds. The reasonability of the grounds which led to the formation of belief warranting reopening is tested from the point of view whether or not they are germane to the formation of belief that income escaped assessment and after 4 years, an additional safeguard or condition that escapement of income was due to fault of the assessee, in not fully and truly disclosing the material facts at the time of original assessment. The Hon'ble Supreme Court endorsing the Full Bench decision of the Hon'ble Delhi High Court in CIT vs. Kelvinator of India Ltd. -held in its order reported in 320 ITR 561,

> *".....that Assessing Officer has power to reopen, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have link with the formation of belief."*

Therefore, if the fresh tangible material which the AO has in his possession is relevant to have nexus to the formation of belief then, of course, the AO would have the necessary jurisdiction to take action under the Act. What is required to be examined is not the adequacy or sufficiency of the grounds but the

existence of belief. In our view, all that one has to examine is that whether there was some material which, gave rise to prima facie view if that income has escaped assessment and the belief was formed in good faith or was it mere pretence for initiating action u/s 147/148 of the Act.

7. Now let us look into the facts pertaining to the assessee company for AY 2001- 02 to examine the legal grounds raised by the assessee in the light of reasons to believe recorded by the AO in his assessment order which reads as under :

> *"It is see that the assessee has claimed exemption u/s. 11 of the IT Act 1961 but the trust is not registered u/s. 12A of the IT Act, 1961, the income derived from the trust is used for private religious purpose which does not ensure for the benefit of the public.*
>
> *It is also seen that the assessee derives income from rent and interest from FD from banks but the expense claimed are purely personal in nature and deduction are not as per section 57 of the IT Act in the case of income from other sources."*

Page 4 of AO order

On perusal of the reasons to believe we find that the case was reopened under section 147 of the Act on account of two reasons. Firstly the assessee claimed exemption under section 11 of the Act without having registration u/s 12A of the Act. Secondly assessee has claimed personal expenses against the income of other sources which are not allowable under section 57 of the Act. However, on perusal of income tax return we find the fact is that the assessee is not registered u/s 12A of the Act and no exemption u/s 11 of the Act was claimed. Similarly, we find that no expense against the income of other sources was claimed by the assessee and consequently no question of claiming personal expense arises. The fact as emerged from the records is that assessee has just shown the TDS deducted in the name of the assessee in its return which is placed on page 60 of the paper book with sole purpose of claiming the refund of the TDS. The assessee has not even shown income

corresponding to TDS in the income tax return. In this regard we find that the income corresponding to TDS was duly shown in the hands of 9 deities/Idols return which are placed on pages 51 to 69 of the paper book.

7.1 Thus it clear that in the reasons recorded, there is no live link between the reasons to believe and income escapement assessment. We are aware that the reason recorded to re-open has to be seen on a standalone basis which triggered to reopen the case under section 147 of the Act. In the light of the above we are of the opinion that it cannot be concluded that AO was not having sufficient information at the time of initiating action u/s 147 for forming reason for escapement of income. In the light of the above, we hold that there was no fresh tangible material available for the foundation on which the AO has made up his mind to reopen the case under section 147 of the Act. Accordingly we find force in the contention of the ld. AR that there was no shred of evidence in the hands of the AO while reopening the case which can be termed as a new tangible material and link to base a reason to believe escapement of income. Therefore, the entire reopening is vitiated on this count. In the absence of the said jurisdictional fact renders the reopening 'coram non judice' and the assessment 'null' in the eyes of law.

7.2 We also find that the AO is under obligation to dispose of the objection raised by the assessee for the reopening of the case under section 147 of the Act by way of speaking order in terms of the Hon'ble Supreme Court in the case of *GKN Driveshafts (India) Ltd v. Income Tax Officer* (2003) 259 ITR 19 (SC). But we find that the AO failed to pass a speaking order on the objections raised by the assessee to the reopening of the assessment. The AO assumed jurisdiction in the instant case on wrong assumption of facts.

In view of above, we are of the view that AO has erroneously usurped jurisdiction which law does not permit him to do on the reasons given above, so the entire action of AO is *ab-initio* void and is quashed.

8. As we have held that the assessment framed u/s 147 of the Act is not sustainable, therefore we're not inclined to adjudicate other grounds of appeal on merits as they become academic and infructuous and we dismiss the same as having become infructuous.

9. In the result, assessee's appeal is allowed.

10. Now coming to the remaining appeals filed by the assessee in **ITA No.216-218/Kol/2016** for AYs 2002-03 to 2004-05. Since common grounds are involved in all these appeals, both the parties agreed whatever view taken in the above appeal (ITA No.215/Kol/2016) of assessee may be taken in these appeals of assessee also, we hold accordingly.

11. **In the result, four appeals of assessee are allowed.**

Order pronounced in the open court 11/01/2017

Sd/-	Sd/-
(न्यायिक सदस्य)	(लेखा सदस्य)
(A.T.Varkey)	(Waseem Ahmed)
(Judicial Member)	(Accountant Member)

Kolkata,

*Dkp, Sr.P.S
दिनांकः- 11/01/2017 **कोलकाता** ।

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. आवेदक/Assessee-Debottor Trust Estate of Rammohan Mullick, 39, Jatindra Mohan Avenue, Kolkata-700 005
2. राजस्व/Revenue-ITO, Ward-43(4), 3, Government Place, Ground Floor, Kolkata-01
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, **कोलकाता** / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

By order/आदेश से,

/True Copy/

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
कोलकाता ।